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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO, LOCAL NO. 243,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Labor Board v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956), this Court ruled that while "[n]o [general employer] restriction may be placed on the employees' [National Labor Relations Act] right to discuss self-organization among themselves . . . no such obligation is owed nonemployee organizers" and that an "employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message." *Id.* at 112. The Court "reaffirm[ed] that general rule" in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). The question presented here is:

Did the National Labor Relations Board err as a matter of law in reading *Lechmere* to require the Board to apply the *Babcock-Lechmere* rule in cases arising *outside* of the organizing context, in which already-organized employees seek to exercise their NLRA right to engage in concerted activity for their mutual aid or protection by distributing handbills to consumers on property that is open to the public generally but that is owned by a business which is not the employees' immediate employer? *

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* Macomb Mall Associates was one of the respondents before the National Labor Relations Board and was an intervenor in the Court of Appeals and thus is a respondent here. (Sears, Roebuck & Co. and Oakland Mall Ltd. also were respondents before the NLRB but they did not participate in the proceedings below). In addition, this case was consolidated for decision below with *United Food and Commercial Workers Local 880 v. NLRB*, D.C. Cir. No. 95-1123. The parties to the proceeding below thus included, in addition to the parties listed in the caption to this petition, Local 880 of the United Food and Commercial Workers.

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PETITION FOR A WRIT OF CERTIORARI

Local 243, International Brotherhood of Teamsters, AFL-CIO, petitions this Court to issue a writ of certiorari to enable the Court to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit in *Food and Commercial Workers Local 880 v. NLRB* and *Teamsters Local 243 v. NLRB*, 74 F.3d 292 (D.C. Cir. Nos. 95-1123 & 95-1260, Jan. 26, 1996).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is officially reported at 74 F.3d 292, and is reprinted in the separately-bound Appendix to the Petition ("Pet. App.") at 1a-17a. The Supplemental Decision and Order of the National Labor

Relations Board at issue in this matter is officially reported at 316 NLRB 1160, and is reprinted at Pet. App. 18a-67a. The original decision of the NLRB in this matter is officially reported at 304 NLRB 832, and is reprinted at Pet. App. 68a-80a.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was issued on January 26, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 7 and 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 157 & 158(a)(1), provide in pertinent part as follows:

> [Sec. 7] Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . .
>
> [Sec. 8(a)] It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this Act.

STATEMENT OF THE CASE

Statement of Facts

This case arises out of an unfair labor practice charge filed by petitioner Teamsters Local 243 ("the Union") against Sears, Roebuck & Co. and two malls in Michigan in which Sears maintained retail stores. The relevant facts are as follows.

At all times material here the Union was the representative of a unit of truck drivers employed by Ryder

DPD, a trucking firm. In July 1988, Sears canceled its contract with Ryder and replaced Ryder with Leaseway Trucking, a non-union, sub-standard firm. As a result of losing its contract with Sears, Ryder laid off upwards of 100 drivers, only a few of whom were hired by Leaseway. Pet. App. 20a, 38a.

In response, Teamsters Local 243 prepared a handbill for the laid-off drivers to distribute to would-be-customers of Sears urging them not to patronize Sears until Sears once again contracted with Ryder. The handbills, which were directed solely to Sears' customers, stated [Pet. App. 21a]:

ATTENTION SHOPPERS

PLEASE do not shop at this . . .
Sears and Roebuck Store!

Sears no longer uses a Company that employs Local 243 Members to deliver merchandise.

As a result, (100) One Hundred Members of Local 243 have lost their jobs. Our Members need your help to get their jobs back.

Thank you . . . .
Teamsters Local 243

On August 2, 1988, six laid-off Rider employees, accompanied by one union representative, began to distribute the handbill at Sears' store in the Oakland Mall in Troy, Michigan. The employees did so at two of the eight exterior entrances to the store and at the one mall entrance to the store; each location was on Sears' property. Pet. App. 22a.

On August 9 and 10, 1988, and again on September 7, 1988, the laid-off employees sought to distribute the same handbills at another Sears' store in the Macomb Mall in Roseville, Michigan. There the handbills were distributed at the mall entrance to the store on mall property and at three exterior entrances to the store on Sears' property. Pet. App. 23a, 24a.

No signs were carried or displayed, and there was no picketing at either store on any occasion. The Administrative Law Judge found that, as instructed, the handbillers stayed at their designated location, permitted free ingress and egress, and limited themselves to politely asking customers to speak to Sears' management on the employees' behalf. Pet. App. 38a.

Notwithstanding the peaceful and non-disruptive nature of the handbilling by the laid-off Ryder employees, on each occasion the employees attempted to distribute the handbills they were forced to leave by Sears and/or mall management. Pet. App. 22a, 24a-25a.

Prior Proceedings

The Teamsters filed unfair labor practice charges against Sears and the two malls (collectively referred to here as "Sears") alleging that Sears had violated § 8 (a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) ("NLRA" or "the Act"), by preventing the laid-off employees from distributing handbills to Sears' customers on property owned by Sears. In a decision issued August 27, 1991, the National Labor Relations Board ("NLRB" or "the Board"), applying the then-current test for evaluating such claims as set forth in *Jean Country*, 291 NLRB 11 (1988), ruled that Sears had violated the Act.

Sears filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit and the Board filed a cross-application for enforcement of its order. While the case was pending, this Court decided *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), holding that the NLRB's *Jean Country* approach to resolving property access cases, "at least as applied to non-employee organizational trespassing," is not "consistent with out interpretation of § 7. 502 U.S. at 536."

Following *Lechmere,* on joint motion of the parties this case was remanded to the Board for reconsideration. The Board, on remand, invited the parties in this case, as well as the parties in a number of other like cases, to submit supplemental statements of position on the implications of *Lechmere.*

On January 25, 1995, a closely divided Board issued its decision in *Leslie Homes, Inc.,* 316 NLRB 123, *pet. for review denied sub nom. Metropolitan Dist. Council of Carpenters v. NLRB,* 68 F.3d 71 (3d Cir. 1995).[1] By a 2-1-2 vote, the Board ruled that *Lechmere* "applies . . . outside the organizing sphere," Pet. App. 93a, to cases in which organized employees seek to exercise their NLRA § 7 right to engage in "concerted activities . . . for . . . mutual aid or protection" by distributing handbills to customers of a non-union competitor which is paying substandard wages and benefits to its employees.

Writing for the majority, Members Stephens and Cohen —while acknowledging that "*Lechmere* addressed only the right of nonemployees to organize on an employer's property"—nonetheless could "discern no reason to assume that [the Court] would apply [*Lechmere*'s] reasoning only in organizing cases," and could find "no . . . signal in *Lechmere*" that the Court intended such a limitation. Pet. App. 94a-95a. Chairman Gould, in a concurring opinion by which he "join[ed] . . . in the majority opinion," agreed with Members Stephens and Cohen that "*Lechmere* resolves the issue definitively." *Id.* at 107a-108a. Chairman Gould added:

> [L]ike the majority, I am of the view that *Lechmere* creates no distinction and sends no "signal" that union efforts to reach customers and the public ought to be treated differently from the initiatives undertaken in *Lechmere* itself. Under the circum-

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[1] For the Court's convenience, we have reprinted the NLRB's decision in *Leslie Homes* at Pet. App. 81a-117a.

> stances of this case, the reasoning employed in *Lechmere* applies. Pet. App. 108a.

Three months after deciding *Leslie Homes*, a divided Board issued its decision in the instant case dismissing the complaint. The majority, consisting of Members Stephens and Cohen, viewed *Leslie Homes*' interpretation of *Lechmere* as determinative in all cases in which the employees seeking to exercise their § 7 rights are not employed by "any of the employers where property interests are at issue." Pet. App. 27a n.12.

Member Truesdale, who had dissented along with Member Browning in *Leslie Homes*, dissented here as well, reiterating his "belie[f] that *Lechmere*'s rationale is properly limited to nonemployee organizational activity on an employer's private property." Pet. App. 31a.

The Union petitioned the United States Court of Appeals for the District of Columbia Circuit to review the decision of the NLRB. That petition was consolidated with a petition filed by Local 880 of the United Food and Commercial Workers seeking review of a separate decision of the NLRB raising the same legal issue.

On January 28, 1996 the court of appeals issued its decision herein, "agree[ing] with the Board that, although *Lechmere* does not purport to decide the precise questions at hand in these cases, the Court's rationale in *Lechmere* disposes of the issues raised by petitioners." Pet. App. at 4a.

REASONS FOR GRANTING THE WRIT

This case presents a question that by its nature only this Court can answer: the meaning—and in light of that meaning the governing scope—of the Court's decision in *Lechmere, Inc. v. NLRB, supra.*

From the NLRA's first contentious days in this Court through *Lechmere,* no set of issues has proved more contentious than the one generated by the conflict between state property law, which in general grants property owners the right to control the activities that take place on their property, and NLRA § 7, which declares that "employees shall have the right" to engage in certain protected activities.

And, from *Republic Aviation Corp. v. Board,* 324 U.S. 793 (1945) through *Labor Board v. Babcock & Wilcox,* 351 U.S. 105 (1956) and on to *Lechmere,* this Court has returned to one aspect of this conflict: efforts by employee union organizers and nonemployee union organizers to exercise the § 7 right of "self-organization" within the workplace. It is common ground that *Lechmere,* in terms, provides a definitive resolution of that issue and, to that extent, brings legal order out of what had been forty years of disorder.

But the union organizing cases have never posed the only conflict between property rights and NLRA § 7 rights. The Act creates not only the right of "self-organization" that is at the center of the *Republic Aviation—Babcock—Lechmere* trilogy, but also the right of organized employees to "engage in concerted activity for the purposes of collective bargaining or other mutual aid or protection." And, as here, the exercise of those rights in the form of picketing and handbilling on privately-owned property raises what has been recognized from the first to be a distinct—and distinctly important—set of legal questions.

Although this Court has not even purported to resolve those questions, the NLRB, in a 2-1-2 decision, has now

read *Lechmere* to provide an authoritative answer and to hold that employees may be precluded from exercising their § 7 right to engage in concerted activity on property that is open to the public generally if that property is owned by someone other than the employees' immediate employer.

The practical consequences of that reading of *Lechmere* are profound. As the instant case—and as the large number of other cases raising this issue confirm, *see* pp. 14-15 *infra*—organized employees often find their wages, and even their jobs, threatened by what other employers do in the marketplace. Recognizing this, the Act grants employees the right to defend their labor standards and their jobs by enlisting the aid of customers of the offending employer in an effort to exert economic pressure on that employer. But as the Board majority now interprets *Lechmere*, what the NLRA grants with one hand it takes back with the other, allowing employers like Sears to prevent handbilling outside Sears' stores, the only place where Sears' would-be-customers can be found.

Unless the Court grants *certiorari* here, the Board majority's reading of *Lechmere*—and the Board rule subordinating the NLRA § 7 "mutual aid or protection" rights of organized employees— will become the law by default (since the NLRB's General Counsel has exclusive authority to bring unfair labor practice cases and the General Counsel is bound by settled Board law in exercising his prosecutorial authority). Thus, this is a situation in which there is no room for litigation elucidaton. The first request for review will also necessarily be the last.

Had the Board majority formulated the rule at issue here based upon its industrial expertise and in the exercise of its administrative discretion, the Court might well be justified in allowing that rule to stand unreviewed. But that is most emphatically not what has happened. Rather, the Board majority concluded that *Lechmere* dictated the

governing rule and that *Lechmere* thereby foreclosed the Agency from bringing its expertise to bear and from exercising any discretion.

Similarly, had the Board majority done business with *Lechmere* in a manner that stills criticism, its decision would command respect. But, as we show below, *Lechmere*'s holding regarding "nonemployee union organizers" rests on a logic that applies only to such organizers—*viz.*, that, properly construed, "§ 7 simply does not protect nonemployee organizers." *See* pp. 17-20 *infra*. By ignoring *Lechmere's* carefully wrought—and carefully explained—interpretation of the NLRA's text and structure and by extending *Lechmere*'s holding to cases in which it is plain beyond doubt that § 7 *does* provide protection, the Board has stretched *Lechmere* well beyond the breaking point.

As matters now stand, then, the rule at issue here does not rest on the Act itself, or on this Court's decisions elaborating on the Act, or on Board decisions treating with the distinct legal question presented here on its own merits, but rather on a 2-1-2 Board decision which pushes *Lechmere* through the wall. Especially given the stakes, the evolution that began in *Republic Aviation* and that has progressed through a complex dialectic to *Lechmere*, should not be put to an end through the use of main force, rather than the force of reason.

Because this request for review is, as just explained, so closely bound up with the correct reading of *Lechmere*, our petition proceeds as follows. We first review the decisions that led up to *Lechmere* both in this Court and in the Board. We then outline in some detail the reasoning of *Lechmere*. Finally, we show that *Lechmere* does not speak to—much less "definitively resolve"—the question posed when organized employees seek to exercise their right to engage in "concerted activity for . . . mutual aid or protection" on the property of someone other than their immediate employer.

A. (1) The Court first confronted the tension between NLRA § 7 and state-law property rights in *Republic Aviation* which involved employees who sought to engage in organizational activity in the workplace. This Court agreed with the Board that it is

> "not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." [324 U.S. at 803 n.10 (quoting *Peyton Packing Co.*, 49 NLRB 828, 843-44 (1943), *enf'd*, 142 F.2d 1009 (5th Cir. 1944)].

Following *Republic Aviation*, the Board applied the same rule to cases involving union organizers who sought access to an employer's property to distribute organizational literature.[2] But in *Babcock & Wilcox*, this Court held that the Board is required "to make a distinction between rules of law applicable to employees and those applicable to nonemployees." 351 U.S. at 113. The Court asserted:

> The distinction is one of substance. No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline . . . But no such obligation is owed nonemployee organizers. [*Id.*]

To the contrary,

> an employer may validly post his property against nonemployee distribution of union literature if rea-

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[2] *See Seamprufe, Inc.*, 109 NLRB 24, 32 (1954), *enf. denied sub nom. Labor Board v. Babcock & Wilcox Co., supra.* ("To differentiate between employees soliciting on behalf of the Union and nonemployee union solicitors would be a differentiation not only without substance but in clear defiance of the rationale given by the Board and the courts for permitting solicitation").

> sonable efforts by the union through other available channels of communication will enable it to reach the employees with its message . . . [*Id.* at 112.]

(2) While the result in *Babcock* was clear enough, the "distinction . . . of substance" that the Court had discerned but had not elaborated proved anything but clear to the Board and the courts of appeals. And, the difficulties raised by the *Republic Aviation—Babcock* dichotomy proved particularly troubling in cases involving the exercise of § 7 rights by organized employees on property owned by someone other than their employer and open to the public generally.

Hudgens v. NLRB, 424 U.S. 507 (1976), was such a case albeit one that did not provide this Court with an occasion for the formulation of definitive rules since the Board decision was based on an erroneous application of the First Amendment and a remand was required to allow the NLRB to render a decision "under the statutory criteria of the National Labor Relations Act alone." *Id.* at 523.[3]

In remanding the case, however, the *Hudgens* Court did offer significant guidance as to the proper method of approach in applying those "statutory criteria." The "task of the Board," *Hudgens* states, "is to 'seek a proper accommodation' " between "§ 7 rights and private property rights." 424 U.S. at 521. And "[w]hat is 'a proper accommodation' in any situation," the *Hudgens* Court added, "may largely depend upon the *content and the context of the § 7 rights being asserted.*" *Id.* (emphasis added).

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[3] *Hudgens* was presaged by *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), a case involving a nonemployee organizer who sought access to a shopping center parking lot open to the public generally. The Board had granted the nonemployee organizer access to that property on the basis of *Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968), a First Amendment case. The *Central Hardware* Court reversed, holding that the Board "erred in applying *Logan Valley* to this case," and the Court remanded the case for further consideration under the NLRA. 407 U.S. at 539.

The *Hudgens* Court went on to observe that whereas "*Babcock & Wilcox* involved organizational activity carried on by nonemployees on the employers' property," *Hudgens* "was different in several respects": *Hudgens* "involved lawful economic strike activity rather than organizational activity"; the activity "was carried on by [the struck employer's] employees (albeit not employees of its shopping center store)"; and "the property interests impinged upon . . . were not those of the employer against whom the § 7 activity was directed, but of another [business]," which was also a "statutory 'employer' under the Act." *Id.* at 521-22 & n.11. These differences, the *Hudgens* Court stated, "may or may not be relevant in striking the proper balance":

> The *Babcock & Wilcox* opinion established the basic objective under the Act: accommodation of § 7 rights and private property rights "with as little destruction of one as is consistent with the maintenance of the other." The locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance. [424 U.S. at 522].

Hudgens offered for the first time an explanation of why a "wholly different balance," *id.* at 521 n.10, had been struck in *Republic Aviation* and in *Babcock*. In *Republic Aviation*, the *Hudgens* Court explained, "the organizational activity was carried on by employees already rightfully on the employer's property." 424 U.S. at 521-22 n.10.[4] Consequently, *Hudgens* reasoned, in *Republic Aviation* only the employer's "management interests"—and not the employer's "property interests" were implicated. *Id.*; *see also Eastex*, 437 U.S. at 572-73 (employer's "reliance on its property rights is largely misplaced").

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[4] *See also* to the same effect *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), which was decided just two years after *Hudgens*.

In contrast, in *Babcock* the nonemployee organizers "sought to trespass on the employer's property" and the employer's "right to keep strangers from entering on its property" was therefore implicated. *Eastex*, 437 U.S. at 571. This "difference," *Hudgens* and *Eastex* both stated, was the " 'one of substance' " to which *Babcock* had adverted. *Hudgens*, 424 U.S. at 522 n.10, and *Eastex*, 437 U.S. at 571, *quoting Babcock*, 351 U.S. at 113.[5]

(3) It was against this background that the NLRB rendered its decision in *Jean Country*, 291 NLRB 11 (1988), the decision whose holding was at issue in *Lechmere*. The *Jean Country* Board read the line of cases from *Babcock* through *Hudgens* to *Eastex* to teach "that there is a 'spectrum' of Section 7 rights and private property rights and that the place of a particular right in that spectrum might affect the outcome of a case." 291 NLRB at 13. Accordingly, the *Jean Country* Board ruled that "in all access cases our essential concern will

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[5] In dissent in *Eastex*, then-Justice Rehnquist sharply criticized the majority's understanding of the law of property:

> Petitioner's right as a property owner to prescribe the conditions under which strangers may enter its property is fully recognized under Texas law. "A licensee who goes beyond the rights and privileges granted by the license becomes a trespasser." . . . Thus, the employees' effort to distribute their leaflet in defiance of petitioner's wishes would clearly be a trespass infringing upon petitioner's property right. [437 U.S. at 580]

See also, e.g., Note, *Still as Strangers: Nonemployee Union Organers on Private Commercial Property*, 62 Tex. L. Rev. 111, 164-65 (1983) ("It is a purely formal distinction that denies protection to one species of trespassory activity because it is a trespass *ab initio* but privileges the other merely because the trespassory activity occurs a few minutes or hours after the employees are already rightfully on the property"); Note, *Property Rights and Job Security: Workplace Solicitation by Nonemployee Union Organizers*, 94 Yale L.J. 374, 380 (1984) ("The employer is asserting a property right to control not merely access to, but more importantly use of, company property. . . . The artificial invitee-trespasser distinction thus veils the fact that, from the point of view of the employer, all workplace solicitation is trespass").

be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted." *Id.* at 14.

In the three years between *Jean Country* and this Court's decision in *Lechmere*, the Board was repeatedly called upon to apply the *Jean Country* balancing test to efforts by organized employees to communicate (through handbills and pickets) with consumers of a particular retail establishment on property open to the general public but privately owned by the establishment or by a mall, shopping center, or office building in which the establishment was located.[6] Some cases involved striking employees who sought to picket their employer on property belonging to a mall or building owner;[7] other cases involved strikers exercising their right under *Labor Board v. Fruit Packers*, 377 U.S. 58 (1964) (*Tree Fruits*), to urge consumers not to purchase products made by the struck employer and sold by a particular store;[8] and still other cases involved unionized employees exercising their right under *DeBartolo Corp. v. Fla. Gulf Coast Trades Council*, 485 U.S. 568 (1988), to urge consumers not to do busines with stores paying sub-standard wages,[9]

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[6] The pre-*Jean Country* cases likewise largely involved consumer handbilling and picketing rather than organizational activity. *E.g.*, *Browning's Foodland, Inc.*, 284 NLRB 939 (1987); *Smitty's Super Markets, Inc.*, 284 NLRB 1188 (1987); *Skaggs Companies, Inc.*, 285 NLRB 360 (1987); *Sisters International Inc.*, 285 NLRB 796 (1987); *L&L Shop Rite, Inc.*, 285 NLRB 1036 (1987).

[7] *Little & Co.*, 296 NLRB 691 (1989); *Galleria Joint Venture*, 303 NLRB 815 (1991), *on remand*, 317 NLRB 1147 (1995).

[8] *Mountain Country Food Store, Inc.*, 292 NLRB 967 (1989), *enf. denied*, 931 F.2d 21 (8th Cir. 1991); *Sentry Markets, Inc.*, 296 NLRB 40 (1989), *enf'd*, 914 F.2d 113 (7th Cir. 1990); *Sylvan Street Grille*, 303 NLRB 975 (1991).

[9] *D'Alessandro's, Inc.*, 292 NLRB 81 (1988); *Polly Drummond Thriftway, Inc.*, 292 NLRB 331 (1989); *Thriftway Supermarket*, 294 NLRB 173 (1989); *Tecumseh Foodland*, 294 NLRB 486 (1989); *Giant Food Stores, Inc.*, 294 NLRB 330 (1989); *Red Food Stores*,

or hiring sub-standard contractors.[10] Consistent with *Jean Country*, the Board's decision in these cases varied depending upon the nature of the specific § 7 activity and precise property interests involved, as well as the alternative means of communication available to the union.[11]

In *Lechmere, Inc.*, 295 NLRB 92 (1989), *rev'd*, 502 U.S. 527 (1992), in contrast, the Board confronted for the first time an attempt by a union organizer to invoke *Jean Country* to gain access to mall property to place organizational leaflets on the windshields of cars belonging to employees of a mall store. The Board, in a two-page opinion, applied *Jean Country* and found that "[t]he Section 7 right asserted is relatively strong" and would be " 'severely impaired' . . . without entry onto the . . . . . property," while "the impairment" of the employer's property right "would not be substantial . . . in light of the . . . fact that the . . . parking lot is essentially open to the public." 295 NLRB at 93-94.

Thus the law stood prior to this Court's decision in *Lechmere*.

B. In *Lechmere*, the Court provided an entirely new synthesis of its decisions mediating the conflict between NLRA § 7 and state property law—one which eschewed the balancing test of prior opinions and substituted instead a categorical rule for "nonemployee union organizers."

Inc., 296 NLRB 450 (1989); *Wegmans Food Markets, Inc.*, 300 NLRB 868 (1990).

[10] *Target Stores*, 292 NLRB 933 (1989); *Best Co.*, 293 NLRB 845 (1989); *Richway*, 294 NLRB 650 (1989); *Hardee's Food Systems, Inc.*, 294 NLRB 642, *pet. for review denied sub nom. Laborers Local 204 v. NLRB*, 904 F.2d 715 (D.C. Cir. 1990); *Target Stores*, 300 NLRB 964 (1990); *Dillard's, Inc.*, 305 NLRB 1102 (1992).

[11] For cases in which each of the factors noted in text were determinative, *see Richway, supra* n. 10; *Hardee's Food Systems, Inc., supra* n. 10; *Tecumseh Foodland, supra* n. 9; *Red Food Stores, Inc., supra* n. 9; *Sylvan Street Grille, Inc., supra* n. 8.

The *Lechmere* Court began its analysis with the language of § 7, noting that the section "provides in relevant part that '[e]mployees shall have the right of self-organization, to form, join, or assist labor organizations." 502 U.S. at 531. The Court drew the following lesson from this language: "[b]y its plain terms . . . the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers." *Id.* at 532 (emphasis in the original).

Lechmere went on to explain that this—and not any distinction between those "already rightfully on the property" and those who "sought to trespass"—was the "distinction 'of substance' " between *Republic Aviation* and *Babcock*. In cases like *Republic Aviation* involving "the organizing activities of employees (to whom § 7 guarantees the right of self-organization)," *id.* at 533, the Board appropriately " 'balanced the conflicting interests,' " *id.* at 537. But in cases like *Babcock* and like *Lechmere* involving "nonemployees (to whom § 7 applies only derivatively," *id.* at 533, the Board is "not permitted to engage in that same balancing," *id.* at 537. The reason, *Lechmere* explains, is "straightforward":

> *§ 7 simply does not protect nonemployee union organizers except* in the rare case where 'the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.' " 502 U.S. at 37, *quoting Babcock*, 351 U.S. at 112 (emphasis added)].

It was on this basis that the *Lechmere* Court concluded that *Jean Country* "at least as applied to nonemployee organizational trespassing," is not "consistent with our past interpretation of § 7." 502 U.S. at 536. *Lechmere* faulted *Jean Country* for framing a rule "which applies broadly 'to all access cases,' " and thereby "misapprehend[ing] th[e] critical point" as to the limit of § 7. 502 U.S. at 538. "[W]here nonemployee organizing is at issue," § 7 simply is not implicated "[s]o long as nonem-

ployee union organizers have reasonable access to employees outside an employer's property . . ." *Id.* It is "*only* where such access is infeasible" that § 7 is triggered and that "it becomes necessary and proper to . . . balanc[e] the employees' and employers' rights as described in the *Hudgens* dictum." *Id.* (emphasis in the original).

C. Given the reasoning of *Lechmere*, the Board in *Leslie Homes* and the court below could not have been more wrong in concluding that *Lechmere* "resolves . . . definitively," p. 5 *supra*, the cases like this one involving the NLRA § 7 "mutual aid or protection" rights of organized employees and employer property rights.

In the first place, *Lechmere* is, in terms, limited to cases involving "nonemployee union organizers." Indeed, on no less than five separate occasions, the *Lechmere* Court stated the governing "rule" or "holding" in those terms.[12] Even the Board in *Leslie Homes* and the court

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[12] *As a rule* . . . an employer cannot be compelled to allow distribution of union literature by *nonemployee organizers* on his property. [502 U.S. at 533; emphasis added]

There is no hint in *Hudgens* and *Central Hardware* . . . that our invocation of *Babcock*'s language of "accommodation" was intended to repudiate or modify *Babcock's holding* that an employer need not accommodate *nonemployee organizers* unless the employees are otherwise accessible. [*Id.* at 534; emphasis added]

While *Babcock* indicates that an employer may not always bar *nonemployee union organizers* from his property, his right to do so remains the *general rule.* [*Id.* at 535; emphasis added]

Babcock's teaching is straightforward: § 7 simply does not protect *nonemployee union organizers except* in the rare case where "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." [*Id.* at 537; emphasis added]

To say that our cases require accommodation between employees' and employers' rights is a true but incomplete statement, for the cases also go far in establishing the *locus* of that accommodation where *nonemployee union organizing* is at issue. So long as nonemployee union organizers have reason-

of appeals here acknowledged as much. *See* pp. 5, 6 *supra*.

But the Board and the appellate court proceeded as if that limitation were merely a fact distinction on the same order as the hair color of those invoking the NLRA. In truth, however, the entire *rationale* for the *Lechmere* rule —the Court's premises and its analysis—turn on the legal status of nonemployee organizers under the Act. *Lechmere* thus makes sense *only* in that context, and cannot be extend to cases in which organized employees seek to exercise their § 7 right to engage in "concerted activity for . . . mutual aid and protection."

The "critical point" of *Lechmere* is that the Board in *Jean Country* had erred by applying the same rule to NLRA § 7 "self-organizing rights" cases that the Board applied to cases involving other § 7 rights. *Lechmere*, in other words, treats nonemployee union organizers as a separate class because § 7's self-organization clause, as construed in *Lechmere*, makes non-employee union organizers a separate class. That clause, said the *Lechmere* Court, shelters employees who choose to engage in the process of organizing themselves but "does not protect nonemployee union organizers." P. 16 *supra*. Nonemployee organizers thus can invoke § 7 "only derivatively" and only to the extent necessary to protect the rights of employees to self-organize.

Given that logic, it cannot be that the *Lechmere* rule and the *Lechmere* rationale—specifically crafted for § 7 "self-organizing" cases as a class of cases separate from other § 7 cases—governs the latter. Any such conclusion flies in the face of the *Lechmere* opinion and makes a mockery of its reasoning. For cases involving the § 7 right of organized employees to engage in "concerted activity . . . for mutual aid or protection" are 180 de-

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able access to employees outside an employer's property, the requisite accommodation has taken place. [*Id.* at 538; first emphasis in the original]

grees removed from nonemployee organizer cases. In the former as opposed to the latter, the audience—the consumers—have no § 7 rights of their own. And, in the former as opposed to the latter the employee-handbilers do have, and are exercising, a direct § 7 right of their own—a right that the Act grants to them *qua* employees —to engage in concerted acitivty for the employees' mutual aid and protection.

That was what the Ryder employees were doing here—seeking to regain their jobs by persuading consumers not to do business with Sears until Sears resumed its contract with Ryder. And that is and what ocurs in the run of consumer handbilling and picketing cases. These cases thus fall outside the rationale of *Lechmere*.

In a law review article analyzing *Lechmere*, Professor Robert Gorman—on whose work this Court has often relied,[13]—came to the very same conclusion. Gorman, *Union Access to Private Property: A Critical Assessment of Lechmere*, 9 Hofstra Lab. L.J. 1 (1991). Professor Gorman reasoned that "*Lechmere* did not speak at all to the fact situation in the bulk of the cases decided by the Board after 1988 under the *Jean Country* analysis—union appeals to customers of the offending employer, typically a retail establishment in a mall setting." These cases differ from organizing cases, Professor Gorman explained, because in the handbilling context

> the person seeking access to private property to communicate the union's message are—unlike the *Lechmere* nonemployee organizers—"employees" (of the targeted company, a competitor or a company contractually related) within the shelter of Section 7 of the NLRA or are the designated majority representative of those employees (who are properly to be treated as acting in their stead and thus entitled to Section 7 rights as well). [9 Hofstra Lab. L.J. at 23].

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[13] *See, e.g., NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 785 & n.6 (1990); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987).

And Professor Gorman went on to observe that in these cases

> there are Section 7 rights to be taken into account, along with the nature and accessibility of the intended audience, and the property interest of the store and/or mall owner. *In those cases, the tripartite analysis invited by Hudgens and fully formulated in Jean Country should still obtain.* [*Id.* (emphasis added)]

D. The Board majority's reading of *Lechmere*—and the Board rule based on that reading—creates an irrational and incoherent body of law.

If, as the Board and the court below have concluded, *Lechmere* extends to all cases involving "nonemployee access"—that is, to all cases in which "the handbillers are neither employees of any of the employers whose property interests are at issue in this case nor employees with any right to enter the property in the course of their employment," p. 6 *supra*—then *Lechmere* and *Hudgens* are in irreconcilable conflict.[14] For the pickets in *Hudgens* were "nonemployees" in the very same sense as the handbillers here: both were exercising § 7 rights on the property of a mall owner with whom the employees had no proximate employment relationship. The *Hudgens* Court viewed that factor as one which "may or may not be relevant in striking the proper balance," and *not* as one which pretermitted the balancing altogether.

On the other hand, if, as we (and Professor Gorman) read *Lechmere*, the opinion teaches that union organizers have a lesser claim under the NLRA when the employer seeks to close his property (because "§ 7 simply does not

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[14] This reading of *Lechmere* also makes the decision difficult to square with the language of the statute, since NLRA § 2(2) expressly provides that "The term 'employee' shall include any employee, *and shall not be limited to the employees of a particular employer.*"

protect nonemployee union organizers"), then *Lechmere* puts into question the continued vitality of a much-discussed *dictum* in a footnote in *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180 (1978). In that case, in the course of holding that state courts are free to exercise jurisdiction over a state-law trespass suit brought against union picketers protesting the employer's payment of substandard wages, the Court stated that "the argument for protection of trespassory area-standards picketing [is] . . . less compelling than that for trespassory organizational solicitation." *Id.* at 206 n.42. While the Board majority and the court below put great weight in this statement, we submit that the Sear's mode of analysis does not survive *Lechmere.*[16]

Whatever else may be true, then, at least this much is clear: *Lechmere* in no way "resolves . . . definitively" what is the governing law when organized employees seek to exercise their § 7 "mutual aid or protection" rights on property that is privately owned but open to the public, much less explains why that is the law. And, unless this Court intervenes, the Board rules that apply will be rules of law only in a formal—and not a substantive—sense. That unworthy result, we submit, should not come to pass.

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[15] As we have developed, at the time *Sears* was decided, this Court was of the view that the key to resolving conflicts between § 7 and property law was to determine whether those seeking to engage in § 7 activity were "already rightfully on the employer's property," *Hudgens,* 424 U.S. at 521-22 n.10. Indeed, the Court reaffirmed and elaborated on that understanding just one month after *Sears* was decided, in *Eastex, Inc.* That being so, *Sears* viewed the "derivative" nature of the organizer's claim of property access as a factor militating in *favor* of the claim, since the employees on whose rights the organizer relied were themselves already "located on the employer's property." 436 U.S. at 206 n.42. But *Lechmere*'s premise is that in such cases the nonemploye organizer's activities are not within § 7 protections at all.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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